INFORMAL CONTRACTS
WITHOUT CONSIDERATION
OR INJURIOUS RELIANCE
Informal Contracts without Consideration or Injurious Reliance

- Not all contracts require consideration. Examples:
  - Formal Contracts
  - Unbargained-for Reliance (Promissory Estoppel)
  - Certain UCC agreements

Past Consideration and Moral Obligation

- Past Consideration and Moral Obligation
  - Past Act does not = Consideration
  - Past Act + Moral Obligation MAY = Consideration
    - BUT
  - Only in a minority of jurisdictions
Five Categories where Past Act + Moral Obligation MAY = Consideration

1. Promises to Pay Pre-existing Contractual Debts
2. Promises to Pay for Benefits Received
3. Promises to Pay Discharged Debts
4. Promises to Perform Voidable Duties
5. Effect of New Promise on the Statute of Frauds
Promises to Pay Discharged Debts

- General rule - Promises to pay debts discharged by law are enforceable without new consideration. Rule is a holdover of the early common law rule.

- Promises to Pay Debts Discharged in Bankruptcy

Formerly the general rule applied. Bankruptcy Reform Act of 1978 makes such promises unenforceable unless made as part of the bankruptcy proceeding.

- Effect of New Promise on Statute of Limitations

Promise to pay commences a new Statute of Limitations.

- Most states require the promise to be in writing and signed.
Promises to Perform Voidable Duties

- New promise to pay obviates voidability

Examples:
- Contracts induced by fraud, duress or mistake
- Agreements with minors once minors reach majority.

Effect of New Promise on the Statute of Frauds
- New oral promise does not solve Statute of Frauds problem
- New written promise usually will solve Statute of Frauds problem.
Certain Commercial and Written Contracts

- Modification of Contracts
  - Consideration Not Required
  - Majority Rule - Under pre-existing duty rule, consideration would be required for a modification.

- Minority Rule - Rule mitigated when unforeseen difficulties arise in performance of agreement

- Small minority rule - Pre-existing duty rule discarded, or discarded in certain circumstances

- UCC § 2-209. Modification, Rescission and Waiver.
  (1) An agreement modifying a contract within this Article needs no consideration to be binding.

- No writing needed unless required for Statute of Frauds or terms of contract.
No-Oral-Modification Clauses; Statute of Frauds

- Oral modification generally allowed, even if agreement bars them by its own terms, though there is contrary authority.

- UCC § 2-209. Modification, Rescission and Waiver.

  (2) An agreement in a signed record which excludes modification or rescission except by a signed record may not be otherwise modified or rescinded, but except as between merchants such a requirement in a form supplied by the merchant must be separately signed by the other party.

- The modification must be made in good faith and not the result of duress.
Certain Commercial and Written Contracts (Cont.)

- Release and Accord and Satisfaction
  - UCC § 1-306. Waiver or Renunciation of Claim or Right After Breach.
  - A claim or right arising out of an alleged breach may be discharged in whole or in part without consideration by agreement of the aggrieved party in an authenticated record.

- Firm Offers
  - No need for consideration to make offer irrevocable if statutory formalities are met.

- Guaranties of Pre-existing Debts
  - Common Law Rule - New consideration required

- Modern rule - Some states statutes (and Article 3 of the UCC) obviate need for consideration if the guarantee is in writing.
Promissory Estoppel as a Substitute for Consideration and Much Else

- Promissory Estoppel:
  - The doctrine that provides that if a party changes his or her position substantially either by acting or forbearing from acting in reliance upon a gratuitous promise, then that party can enforce the promise although the essential elements of a contract are not present.

- Restatement 2d § 90 - Promise Reasonably Inducing Action or Forbearance
  - (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
  - (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.
The Roots of Promissory Estoppel

- Promises in the Family

- *Ricketts v. Scotthorn*, 57 Neb. 51 (1898)

- Promise to Make a Gift of Land

- Taking possession and making improvements can serve as a substitute for consideration.
Gratuitous Agencies and Bailments


- Modern view - Was there injurious reliance?

- Charitable Subscriptions and Marriage Settlements

- While courts have contorted their decisions to find “consideration,” we allow enforcement of Charitable Subscriptions and Marriage Settlements as they rarely have consideration but are in the public interest.
The Modern Evolution of Promissory Estoppel

- Reliance on Offers
  - Restatement 2d §87
    - (2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

- Promissory Estoppel Under an Indefinite Agreement

- *Wheeler v. White*, 398 S.W. 2d 93 (Tex. 1965)
Promises Made During Preliminary Negotiations

- Promissory estoppel may give rise to a cause of action even though no contract was formed or in the absence of an intent to be bound.

- Agreements Disclaiming Legal Consequences

- Courts have allowed the concept of injurious reliance to trump contract provisions allowing employers to withdraw pensions and other benefits

- Flexibility of Remedy
  - Full contract damages (expectation)
  - Limited damages (reliance)